(1)

Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

TRAVIS WERTH,

Petitioner,

v.

JANE F. GARVEY, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

Federal Aviation Regulation 14 C.F.R. Part 135, defines the circumstances under which a crewmember of an air carrier is required to grant a properly identified inspector from the Federal Aviation Administration ("FAA") access to that air carrier aircraft. Under Part 135, the pilot in command of the aircraft may permit an inspector onboard and into the cockpit of the aircraft. However, all crewmembers must grant an inspector access to all other parts of the aircraft.

The question presented here is whether under the Federal Aviation Regulations, 49 C.F.R. §§135.73-135.75, the FAA's considered interpretations, and the National Transportation Safety Board's ("NTSB") rulings thereon, a pilot who is not the pilot in command of an air carrier's aircraft must grant an FAA inspector access to the cockpit of that aircraft.

The question ultimately is whether the FAA's post hoc informal interpretation of its own regulations should be granted conclusive deference to warrant a 30-day suspension of the Petitioner's pilot certificate.

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Travis Werth hereby petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Werth v. Garvey*, Eleventh Circuit No. 00-10607-JJ [July 21, 2000 (Panel Rehearing denied September 19, 2000)].

OPINIONS BELOW

The Eleventh Circuit Court of Appeals opinion is unreported and is reproduced as Appendix A (Pet. App. 1a-3a) in the separately bound Appendix to this *certiorari* petition.

The Eleventh Circuit Court of Appeals Denial of the Petition for Panel Rehearing is unreported. It is reproduced as Appendix C (Pet. App. 8a) in the separately bound Appendix to this *certiorari* petition.

The National Transportation Safety Board Opinion and Order and is reproduced as Appendix B (Pet. App. 4a-7a) in the separately bound Appendix to this *certiorari* petition.

The National Transportation Safety Board Opinion and Order Denying Reconsideration and is reproduced as Appendix D (Pet. App. 9a-11a) in the separately bound Appendix to this *certiorari* petition.

JURISDICTIONAL STATMENT

The Court of Appeal's Opinion and Judgment were entered on July 21, 2000. A Petition for a Panel Rehearing was denied September 19, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves the construction of two Federal Aviation Regulations, 14 C.F.R. §135.73 and 14 C.F.R. §135.75.

STATEMENT OF THE CASE

On September 5, 1997, the Administrator of the FAA issued an Order of Suspension suspending the Petitioner's pilot certificate for a period of 30 days for an alleged violation of Section 135.73 of the Federal Aviation Regulations. Section 135.73 of the Federal Aviation Regulations reads in pertinent part as follows:

> Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or test (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

The essential facts are that Petitioner was second in command (i.e., 2nd Officer, Co-pilot) of N185BA, a Learjet Model 35 on Part 135 commercial operation that was parked at the ramp at Byrd International Airport, Antigua. An FAA Inspector, Mr. Paul Hlavez, approached the aircraft to perform a "ramp inspection" of the aircraft. Petitioner, politely, informed the inspector that only the Captain could permit him access to the cockpit of the aircraft.

Essentially, Petitioner testified that his Company's Operation Manual contained provisions that allowed only the captain of the aircraft to permit the inspector access to the cockpit. The FAA inspector corroborated that the Petitioner refused access to the

aircraft because of his interpretation of the Company Manual and the Federal Aviation Regulations. The relevant portion of the Company's Manual, in addition to citing Federal Aviation Regulation 135.73 quoted above, the Company Manual also cites Federal Aviation Regulation 135.75, which reads in pertinent part as follows:

> Whenever, in performing the duties of conducting an inspection, an FAA inspector presents an Aviation Safety Inspector credential, FAA Form 110A, to the pilot in command of an aircraft operated by the certificate holder, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft. ...

It should also be pointed out that the Petitioner cooperated with every other demand made by the FAA inspector. Specifically, the Petitioner showed the inspector his medical certificate, his pilot's certificate, the aircraft registration, and the aircraft airworthiness certificate. In no way did the Petitioner attempt to hinder the FAA inspector from performing his duties, he simply requested that the inspector, in accordance with the Company Manual (i.e., Federal Aviation Regulation §135.75) wait for the pilot in command (i.e., the Captain) before entering the flight-deck.

PROCEDURAL HISTORY OF THE CASE

On September 5, 1997, the Administrator of the FAA issued an Order of Suspension suspending the Petitioner's pilots license for a period of 30 days for a violation of §135.73 of the Federal Aviation Regulations. Petitioner appealed the decision and an administrative hearing was held on March 19, 1998, wherein the Administrative Law Judge affirmed the Order. The Petitioner appealed that decision and the

NTSB issued an Opinion and Order on May 13, 1999, affirming the Administrative Law Judge's decision.

On June 10, 1999, Petitioner petitioned the NTSB for Reconsideration of its Opinion and Order of May 13, 1999, affirming the Administrative Law Judge's decision. On December 15, 1999, the NTSB issued its Opinion and Order Denying Reconsideration (Order No., EA-4766).

On February 1, 2000, Petitioner petitioned the United States Court of Appeals for the Eleventh Circuit to review, the NTSB's original Opinion and Order (Order No., EA-4766) and Order Denying Reconsideration (Order No., EA-4807). On July 21, 2000, the Eleventh Circuit issued an opinion denying Petitioner's Petition for Review. On August 28, 2000, Petitioner petitioned the Eleventh Circuit for a Panel Rehearing. On September 19, 2000, the Eleventh Circuit denied the Petition for a Panel Rehearing.

REASONS FOR GRANTING THE WRIT

This case presents questions of federal law on which the Circuit Courts of Appeal are divided as well as presenting a situation whereby the Eleventh Circuit Court of Appeals has failed to follow the decisions of this Court. May the FAA make a post hoc informal interpretations of its own regulations, fail to request deference, and nonetheless effectively be granted conclusive deference to the interpretation to warrant a 30-day suspension of a pilot's certificate.

The application of Federal Aviation Regulation, 14 C.F.R. §135.73, contained in the decision of the Eleventh Circuit below is an erroneous application of federal law in that it violates this Court's rule as set forth in *Auer v. Robbins*, 519 U.S. 452 (1997), and *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), limiting deference to interpretations of ambiguous

regulations only, and to those interpretations that have been formally adopted by the respective agency.

I.
THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S RECENT DECISIONS

On July 21, 2000, the United States Court of Appeals for the Eleventh Circuit issued an opinion denying Petitioner's Petition for Review by stating the following:

> In matters of regulatory interpretation, this Court should defer to the FAA's interpretation of its own regulations unless it is plainly erroneous or inconsistent with the regulation. *See Martin v. OSHRC*, 499 U.S. 144, 150 (1991); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

The Eleventh Circuit misapplied this Court's holding in *Chevron* in that the court failed to consider the recent United States Supreme Court case of *Christensen v. Harris*, 120 S. Ct. 1655 (2000). *Christensen* substantially modified *Martin* and *Chevron* concerning the issues of deference owed to agency interpretations of its own regulations.

The *Chevron* decision as interpreted by this Court in *Christensen* effectively requires that the lower courts analyze the agency's process by which it adopts interpretations to determine whether an agency's interpretation of its own regulations should be given *Chevron* type of deference. *Christensen*, 120 S. Ct. at 1655.

According to this Court's holding in *Christensen*, the lower courts should determine whether the regulation is ambiguous. *Christensen*, 120 S. Ct. at 1664 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). To determine whether the regulation is ambiguous, the courts must undertake a statutory or regulatory construction analysis. If the regulation is not ambiguous, then the court should apply the plain meaning of the regulation. If, however, the regulation is ambiguous, then the court should proceed to the next step of the analysis where the court must determine the character of the interpretation *Christensen* 120 S. Ct. at 1663-64; *Auer*, 519 U.S. at 452. If the interpretation is of the informal type such as opinion letters, policy statements, agency manuals, or enforcement guidelines, (i.e., interpretations that lack the force of law), then the interpretation does not warrant *Chevron* type of deference. *Christensen*, 120 S. Ct. at 1663-64; *Auer*, 519 U.S. at 452.

If, however, the interpretation is of a formal nature arrived at after a formal adjudication or formal rulemaking, then the agency's interpretation will be entitled to *Chevron* type of deference *Christensen*, 120 S. Ct. at 1663-64; *Auer*, 519 U.S. at 452.

Accordingly, if the regulation is ambiguous and the agency interpretation is of a formal nature, the agency's interpretation should be given deference provided that the interpretation is not plainly erroneous. *Chevron*, 467 U.S. at 837.

As indicated above, the first step of the lower court's analysis pursuant to *Christensen* is for the court to perform a statutory construction analysis to determine whether the regulation is ambiguous and thus entitled to *Chevron* type of deference. *Christensen*, 120 S. Ct. at 1664; *Auer*, 519 U.S. at 452. Specifically, in deference cases this Court has engaged in an extensive review process, which involves

consideration of the various principles of statutory construction. *Chevron*, 467 U.S. at 843; *Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990); *University of Cal. v. Public Employment Relations Bd.*, 108 S. Ct. 1404, 1413 (1988) (White, J., concurring); *NLRB v. United Food & Commercial Workers*, 484 U.S. 112, 123 (1987); *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

After performing the statutory construction analysis, if the language of the regulation is clear, that language must be given effect, unless such meaning would lead to an absurdity. *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring) (citations omitted).

In undertaking this statutory construction review, this Court has considered a statute's language, *Presley v. Etowah County Comm'n*, 112 S. Ct. 820, 823 (1992); *Cardoza-Fonseca*, 480 U.S. at 429-32; *Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361,386 (1986); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131-32 (1985); see also *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 110 S. Ct. 2759, 2769 (1990); *Dole v. Untied Steelworkers of Am.*, 110 S. Ct. 929, 934 (1990).

This Court has also considered the structure of the statute as a whole, *Maislin* 110 S. Ct. at 2769; *Dole* 110 S. Ct. at 938 (rejecting the agency's interpretation noting that, because "the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation"); *EEOC v. Commercial Office Prod. Co.*, 108 S. Ct. 1666, 1674 (1988); *Bethesda Hosp. Ass'n v. Bowen*, 108 S. Ct. 1255, 1259 (1988) ("While the express language of subsection (a) requires the result we reach in the present case, our conclusion is also supported by the language and design of the statute as a whole.").

This Court has even considered the canons of construction. *Dole* 110 S. Ct. at 935 ("The traditional canon of construction, noscitur a sociis, dictates that 'words grouped in a list should be given related meaning.'" (quoting *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989) (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1,8 (1985).

The regulations at issue read in pertinent part as follows:

Federal Aviation Regulation §135.73:

> Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or test (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

Federal Aviation Regulation §135.75:

> Whenever, in performing the duties of conducting an inspection, an FAA inspector presents an Aviation Safety Inspector credential, FAA Form 110A, to the pilot in command of an aircraft operated by the certificate holder, the inspector must be given free and uninterrupted access to the pilot's compartment of that aircraft. However this paragraph does not limit the emergency authority of the pilot in command to exclude any person from the pilot compartment in the interest of safety.

In construing two regulations, if the subject of the regulations is of the same matter, the courts must construe the regulations in pari materia. That is, the

two regulations must be construed with reference to each other. Neither the FAA nor the NTSB even attempted to read the two regulations in pari materia.

Petitioner asserts that the two regulations at issue are not ambiguous when read in pari materia. Federal Aviation Regulation 135.73 provides unconditional authority of any FAA employee at any place or time to inspect an any area over which the FAA has jurisdiction, generally at airports, repair facilities, small operations, or other locations where regulated activities take place. Federal Aviation Regulation 135.75, on the other hand, was designed to deal with a specific area of the aircraft over which the FAA exercises tight control limiting access of even its own employees. Specifically, access to the pilot compartment of the aircraft is limited to FAA Aviation Safety Inspectors possessing an FAA Form 110-A. Additionally, Federal Aviation Regulation 135.75 limits the authority of allowing access to the pilot compartment to the pilot-in-command only. Reading Federal Aviation Regulation 135.75 correctly, no one else but the Captain of the aircraft is authorized to grant access to the flight deck.

Petitioner submits that Federal Aviation Regulation 135.73 introduces a broad general rule with respect to access to general areas where the FAA exercises jurisdiction over locations where regulated activities take place. Federal Aviation Regulation 135.75, however, presents the exception to the Federal Aviation Regulation 135.73 where the "pilot compartment," flight deck, or cockpit is the area that the FAA needs to inspect. This exception, like all exceptions, operates to restrict the applicability of the general rule. As such, Federal Aviation Regulation 135.75 is an exception to Federal Aviation Regulation 135.73 granting authority to confer access to the pilot compartment by the pilot in command only, and only

to FAA Aviation Safety Inspectors possessing an FAA Form 110-A.

Petitioner asserts that the application of the regulation by the NTSB and the FAA runs afoul of the concept of in pari materia. If the application of the regulation is permitted to stand, then the general rule set out in Federal Aviation Regulation 135.73 would virtually swallow the exception set out in Federal Aviation Regulation 135.75. The current application by the NTSB and the FAA would render Federal Aviation Regulation 135.75 meaningless, another principle contrary to rules of statutory construction. Effectively, the application of the two regulations would allow virtually every FAA employee access to the pilot compartment despite the specific language of Federal Aviation Regulation 135.75 that limits access to those FAA employees possessing a 110-A Form.

Further, Petitioner asserts that the application of the two regulations is inconsistent with the fundamental rule of statutory construction that specific regulations should be construed to supplant general regulations when the two conflict. Federal Aviation Regulation 135.73 is a general rule applicable to virtually every FAA inspector charged with conducting inspections, including Security Inspectors, Hazardous Material Inspectors, Cargo Inspectors, Cabin Safety Inspectors, and Aviation Safety Inspectors. Federal Aviation Regulation 135.75, however, presents the specific exception to the general rule where the "pilot compartment," flight deck, or cockpit is the area that the FAA needs to inspect. Accordingly, the specific rule set out in Federal Aviation Regulation 135.75 supplants the general rule set out in Federal Aviation Regulation 135.73. Thus, Petitioner was not permitted to grant the FAA inspector access to the pilot compartment and should not have been found in violation of that regulation.

Notwithstanding the foregoing, if this Court still finds that the regulation is ambiguous after conducting a statutory construction analysis, then the court should proceed to the next step of the *Christensen* analysis where this Court must determine the character of the interpretation. *Christensen* 120 S. Ct. at 1663-64. If the interpretation is of the informal type such as opinion letters, policy statements, agency manuals, or enforcement guidelines, (i.e., interpretations that lack the force of law), then the interpretation does not warrant *Chevron* type of deference. *Id.* at 1663-64. If, however, the interpretation is of a formal nature arrived at after a formal adjudication or formal rulemaking, then the agency's interpretation will be entitled to *Chevron* type of deference. *Id.*

Petitioner submits that the FAA failed to articulate an interpretation of either of the regulations at issue. At best, the FAA has argued that the Federal Aviation Regulation 135.73 applies to the Petitioner because Petitioner refused to allow an FAA Aviation Safety Inspector access to an aircraft. That is not an interpretation, it is an argument for application of the regulation in an enforcement or litigation setting. In spite of the Eleventh Circuit's decision, the Eleventh Circuit could not have literally given deference to the FAA's interpretation of the regulation because the FAA never provided an interpretation at the administrative level. At best, the only thing to which the Eleventh Circuit could have deferred was the application of the regulation in an enforcement proceeding, not a true agency interpretation.

Accordingly, this non-articulated litigation position is not of the type of interpretation that falls within the scope of a formal interpretations requiring *Chevron* type of deference. It was not arrived at after a formal adjudication or formal rulemaking and should be given little or no deference at all. The agency failed

to even publish its interpretation in the Federal Register as it has done in the past in order to ensure that it was an "official interpretation" of the agency. *Garvey v. NTSB*, 190 F.3d 571 at n.8.

II.
THERE IS A CONFLICT BETWEEN THE CIRCUITS AS TO THE MANNER IN WHICH THE FAA MAY REQUEST DEFERENCE TO ITS INTERPRETATIONS

The United States Court of Appeals for the Fifth Circuit in *Hinson v. NTSB*, 57 F.3d at 1144 held that an interpretation is not properly preserved for appeal when the FAA fails to articulate its own interpretation or fails to argue for deference. In this case, the FAA half-heartedly articulated an interpretation and failed to ask for deference. Accordingly, the FAA's unarticulated interpretation is not entitled to deference since it was not properly preserved for appellate review. Specifically, where the FAA fails to articulate its own interpretation or argue for deference, the matter has not been properly preserved for appeal, and the FAA's interpretation is not entitled to deference. *Hinson* 57 F.3d at 1144.

In this case, the FAA neither preserved the matter for appeal nor requested deference. Accordingly, the effect of the Eleventh Circuit's decision in this case, is at odds with the decision of the United States Court of Appeals for the District of Columbia in *Hinson*.

As indicated above, the FAA failed to articulate its interpretation of the regulation at the administrative level. Regulatory interpretations occurring after agency proceedings have terminated do not constitute an exercise of the agency's delegated lawmaking powers and are not entitled to *Chevron* deference. *Garvey*, 190 F.3d at 571 n.8. Further, the FAA failed to request deference until the court of

appeals level. Accordingly, the matter was not preserved and the FAA's interpretation outside the realm of agency action is not entitled to deference.

Moreover, litigation positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action advanced for the first time in the reviewing court. *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 212 (1988). *Garvey*, 190 F. 3d 571 n.8. In this case, the current assertion advanced by the FAA is nothing more than a position taken by its litigators advanced for the first time at the court of appeals level.

The fact that the FAA failed to take necessary steps to ensure that this alleged interpretation was an "official interpretation" clearly demonstrates that the FAA has not adopted counsel's interpretation of the regulation as an official agency interpretation. Had the agency published this interpretation in the Federal Register as it did in the *Merrill* case, then counsel's argument would carry some weight. The agency, however, failed to publish the interpretation and did not even advance an interpretation at the administrative level at the hearing on the merits. This failure further demonstrates that the FAA's position was not officially adopted by the agency and should not be given any deference.

For the first time at the court of appeals level within its brief, the FAA half-heartedly attempts to submit an interpretation explaining how the two regulations at issue can coexist under the circumstances presented. Specifically, the agency contends that Federal Aviation Regulation 135.75 applies to "en route inspections" that are conducted during flight, while Federal Aviation Regulation 135.73 applies to all other inspections that are conducted on the ground.

The FAA's interpretation in its court of appeals brief is peculiar. If Federal Aviation Regulation 135.75(a) applied to "in flight" or "en route" inspections as the FAA now asserts, the regulation would plainly state such. The truth of the matter is that the Federal Aviation Regulations are littered with references to "in flight" operations or "en route" inspections, including the two regulations surrounding Federal Aviation Regulation 135.75(a). The fact that the redactors of the regulation chose to omit the terms "in flight" or during "en route" inspections validates the notion that the redactors did not intend to limit Federal Aviation Regulation 135.75(a) to in flight operations only. Clearly, the redactors intended that the type of inspections to be conducted pursuant to Federal Aviation Regulation 135.75(a) would include both in flight and ground inspections.

III.
THE FEDERAL AVIATION ADMINISTRATION'S INTERPRETATION IS CONTRARY TO FEDERAL LAW AND VIOLATES DUE PROCESS

The FAA's argument violates the principle of expressio unius est exclusion alterius, a concept that the courts have consistently adopted. Specifically, where the redactors of a regulation or statute include particular language in one section of a statute or regulation but omit it in another section of the same statute or regulation, it is generally presumed that the redactors acted intentionally in the disparate inclusion or exclusion. *Cardoza-Fonseca*, 480 U.S. at 432 [quoting Russello v. United States, 464 U.S. 16, 23 (1983)].

Further, if Federal Aviation Regulation 135.73 applied to ground operations only, why would the regulation specifically include "en route inspections" which can only be conducted in flight. The FAA's late interpretation here is nothing more than an attempt to

overcome the regulation's obvious meaning by requesting deference to an otherwise irreconcilable interpretation.

Finally, counsel for the FAA's assertion that Federal Aviation Regulation "135.75 simply sets forth a PIC's obligation to allow an inspector access to the cockpit" after presenting the proper credentials is an attempt to confuse the courts. How or why the FAA can make such an assertion when the regulation specifically grants the pilot-in-command the right to "exclude person's from the pilot compartment in the interest of safety" is dumbfounding. This language alone grants the pilot-in-command sole discretion of whom to allow and whom to exclude from the pilot compartment. How or why the FAA can make such assertions is beyond comprehension.

Notwithstanding that Petitioner disagrees with the FAA's current analysis of the regulation. Even if counsel for the FAA is correct here, the FAA Aviation Safety Inspector never presented his credentials to the pilot-in-command of the aircraft. As such, according to the FAA's own interpretation, it was still improper for the Petitioner to grant the FAA's Aviation Safety Inspector demand for access to the entire aircraft including the pilot compartment.

In spite of the FAA's late interpretation, Petitioner would still have encountered the "double dilemma" of being forced into a posture whereby he was ultimately placed in the precarious position of choosing which regulation to obey and which to violate. Under these circumstances, this Court should reject the agency interpretation or otherwise refuse to defer to the agency's interpretation as many courts have done in the past where the agency' interpretation is clearly erroneous. See e.g., *Lechmere, Inc. v. NLRB*, 112 S. Ct. 841, 850 (1992); *EEOC v. Arabian Am. Oil*

Co., 111 S. Ct. 1227, 1246 (1991); *Presley*, 112 S. Ct. at 831-32 (1992); *Maislin*, 110 S. Ct. at 2768.

Moreover, the FAA's interpretation of the regulation, if given deference, denies Petitioner due process. Courts have increasingly held that even though an agency's interpretation may merit deference, the agency cannot enforce its interpretation unless the regulated party has received fair notice of the agency's understanding of its own regulation. This is the case where such a regulation is ambiguous and therefore necessitates an interpretation. *Georgia Pac. Corp. v. Occupational Safety & Health Review Comm'n*, 25 F.3d 999, 1005-06 (11th Cir. 1994); *Kropp Forge Co. v. Secretary of Labor*, 657 F.2d 119, 123-24 (7th Cir. 1981); *Dravo Corp. v. Occupational Safety & Health Review Comm'n*, 613 F.2d 1227, 1232 (3d Cir. 1980); *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649-50 (5th Cir. 1976). The courts have applied that approach largely in cases involving civil penalties, but occasionally it also has been invoked for those who have forfeited governmentally dispensed rights because of vague regulatory standards. See, e.g., *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987); *Maxcell Telecom Plus*, 815 F.2d at 1558; *Radio Athens*, 401 F.2d at 404. As the D.C. Circuit explained in *Satellite Broadcasting*, which involved the dismissal of a license application, a major premise of *Seminole Rock* deference is that both an agency's and a regulated party's reading of a regulation may be reasonable, which has important implications for issues of notice. *Satellite Broadcasting*, 824 F.2d at 3.

Essentially, the case law holds that an agency through its regulatory power cannot, in effect, punish a member of the regulated class for reasonably interpreting agency rules. Otherwise the practice of administrative law would come to resemble "Russian Roulette." The agency's interpretation is entitled to

deference, but if it wishes to use that interpretation to cut off a party's right, it must give full notice of its interpretation. *Satellite Broadcasting*, 824 F. 2d at 3-4. The court therefore has held that enforcement of a novel regulatory construction, without sufficient notice, is ipso facto arbitrary and capricious. See *id.*

Notwithstanding several opportunities to do so, the FAA has failed to explain how the inspector's request for access to conduct a ramp inspection was not a request for access to the pilot compartment. Accordingly, Petitioner challenges counsel for the FAA to provide an interpretation of the two regulations explaining how the Petitioner could have responded to the FAA inspector's request for unlimited access to the aircraft without violating either Federal Aviation Regulation 135.73 or Federal Aviation Regulation 135.75. Petitioner submits that it is impossible for the second in command of an aircraft to grant an FAA inspector's request for a ramp inspection, which included access to the flight deck, without violating Federal Aviation Regulation 135.75.

Petitioner was properly following Federal Aviation Regulation 135.75, which specifically precludes him or anyone other than the pilot in command of the aircraft from permitting access to the pilot compartment. Further, it was undisputed that the FAA inspector demanded access to the pilot compartment, not just the cabin area only. The two FAA regulations at issue are inconsistently interpreted by the FAA to the extent that the Mr. Werth was forced into a posture whereby he was ultimately placed it the precarious position of choosing which regulation to obey and which to violate. The irony of the matter is that had Mr. Werth, as second-in-command of the aircraft, allowed the FAA Aviation Safety Inspector access to the pilot compartment, he would have been subject to a violation of Federal Aviation Regulation 135.75.

CONCLUSION AND PRAYER

For the foregoing reasons, this petition for *certiorari* should be granted. Further, Petitioner respectfully requests that this Court stay the mandate issued by the Eleventh Circuit pending the outcome of this matter.

Respectfully submitted,

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For The Eleventh Circuit

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-10607
Non-Argument Calendar

FAA No. SE-15013

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

JUL 21 2000

THOMAS K. KAHN
CLERK

TRAVIS WERTH,

Petitioner,

versus

JANE F. GARVEY, Administrator,
Federal Aviation Administration,

Respondent.

On Petition for Review from an Order
of the National Transportation Safety Board

(July 21, 2000)

Before BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM

This case is before us on a petition for review of an order of the National Transportation Safety Board ("NTSB"). In his petition, Travis Werth ("Werth") contends that the Federal Aviation Administration ("FAA") wrongfully issued an order suspending his airline transport pilot (ATP") certificate for thirty days for violating 14 C.F.R. §135.73 (1996). The FAA contends that Werth violated the regulation on July 18, 1996 at V.C. Bird International Airport, Antigua, when he refused FAA Aviation Safety Inspector Paul Hlavaz's ("Hlavaz") request to conduct a ramp inspection of a Learjet aircraft. At the time of the attempted ramp inspection, Werth was the first officer of the aircraft.

A hearing was conducted before an administrative law judge ("ALJ"), at the conclusion of which the ALJ affirmed the violation of section 135.73 and the thirty-day suspension of Werth's ATP certificate. Werth appealed the ALJ's decision to the full NTSB, which affirmed the ALJ's order affirming the FAA's order of suspension. Werth now seeks this court's review.

This court should hold an agency action to be lawful unless arbitrary, capricious, an abuse of discretion and otherwise contrary to law. *See Union Flights, Inc. v. Federal Aviation Admin.*, 957 F.2d 685, 686 (9th Cir. 1992); *Chritton v. National Transp. Safety Bd.*, 888 F.2d 854, 856 (D.C. Cir. 1989). In matters of regulatory interpretation, this court should defer to FAA's interpretations of its own regulations unless it is plainly erroneous or inconsistent with the regulation. *See Martin v. OSHRC*, 499 U.S. 144, 150 (1991); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

After reviewing the record in this case, we conclude that the FAA and the NTSB properly determined that Werth violated section 135.73 when he denied

inspector Hlavaz's access to the aircraft for a ramp inspection. Accordingly, we deny the petition for review.

PETITION DENIED.

SERVED: May 13, 1999
NTSB Order No. EA-4766

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 12th day of May, 1999

JANE F. GARVERY, Administrator, Federal Aviation Administration, Complainant, v. TRAVIS WERTH, Respondent.	)	Docket SE-15013

OPINION AND ORDER

The respondent has appealed from the initial decision Administrative Law Judge William E. Fowler, Jr., rendered in this proceeding on March 19, 1998, at the conclusion of an evidentiary hearing.[1] By that decision, the law judge affirmed an order of the Administrator suspending "any and all airman pilot certificates held [by respondent], including Commercial Pilot Certificate No. 367901243," for his alleged failure, in violation of section 135.73 of the Federal Aviation

[1] An excerpt from the hearing transcript containing the initial decision is attached.

Regulations ("FAR," 14 CFR Part 135),[2] to allow a representative of the Administrator to perform a ramp inspection of the aircraft he was preparing to operate for Cirrus Air, also known as Professional Flight Crew Services. For the reasons discussed below, the appeal will be denied.

This case arose from an FAA inspector's attempt to conduct a ramp inspection on N185BA, a Lear Model 35, at VC Bird International Airport, Antigua. Respondent, the co-pilot, was standing outside the aircraft's door waiting for his four passengers when the inspector approached him, showed his credentials, and announced his intention to ramp check the aircraft. Instead of allowing the inspector unrestricted access, however, respondent advised that under his company manual, he could not let the inspector in, only the captain could. Despite several requests, respondent persisted in his refusal to permit the inspector, in the absence of the captain, to enter and inspect the aircraft.[3]

Like the laws judge, we entertain no doubt that respondent's insistence that the inspector wait for the

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[2] FAR section 135.73 provides as follows:

§ 135.73 Inspections and tests.

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holder's operating certificate, and operations specifications.

[3] The captain also denied the inspector access to the aircraft when he arrived some 10 to 15 minutes later after completing some business with Customs. He claimed, without foundation, subsequent inquiry revealed, that his company's operations specifications only allowed the aircraft to be inspected in Fort Lauderdale, Florida.

captain before entering the aircraft to fulfill his inspection duties constituted a refusal to allow an inspection that FAR section 135.73 obligated him to permit. Moreover, we agree with the law judge that respondent's state of mind is not relevant. In this regard we note that not only did the respondent's company manual not in any way purport to limit his authority to grant access to an aircraft for a ramp inspection, it set forth in full the FAR which is the basis for this certificate action.[4] Thus, it is difficult to escape the conclusion that respondent either knowingly misrepresented his company's written policy or was unjustifiably ignorant of it, given his obligation to be familiar with the federal regulations it mirrors. Neither possibility would serve to excuse the respondent from the unequivocal regulatory requirement that he allow an inspection "at any time or place."

In view of the foregoing, we disagree with the suggestion of counsel for respondent that the sanction should be reduced or converted to a civil penalty because respondent believed he was complying with the law. Nevertheless, assuming, arguendo, that respondent misapprehended the nature of his responsibility, we would not agree that this would be an appropriate case in which we would reduce sanction. This is not a case in which an airman was simply misinformed as to regulatory requirement. This case involves an airman who, without convincing justification, chose to disregard the advice of a representative of the Administrator as to the scope of his authority to conduct an inspection before an aircraft was operated in commercial service. Reducing

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[4] The company manual also includes the full text of FAR section 1374, which, according to the testimony by the inspector in this matter, sets forth a pilot-in-command's obligation to allow an en route inspection when so requested by an FAA inspector presenting proper credentials.

respondent's sanction, in these circumstances, would effectively minimize his defiance of a request he now concedes, and should have known, was a lawful one. We decline the invitation to take an action which could be construed as endorsing unjustified or insubstantial challenges to an FAA inspector's authority that impede or preclude the timely performance of vital and necessary safety functions.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The initial decision and the order of the Administrator are affirmed; and

3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service date indicated on this opinion and order.[5]

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSHMIDT, GOGLIA, and BLACK, members of the Board, concurred in the above opinion and order.

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[5] For purposes of this opinion and order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration, pursuant to FAR § 61.19(f).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-10607-JJ

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEP 19 2000
THOMAS K. KAHN
CLERK

TRAVIS WERTH,

Petitioner,

versus

JANE F. GARVEY, Administrator,
Federal Aviation Administration,

Respondent.

On Petition for Review from an Order
of the National Transportation Safety Board

BEFORE: BIRCH, DUBINA and CARNES, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Petitioner is DENIED.

ENTERED FOR THE COURT

s/Justice Dubina
UNITED STATES CIRCUIT JUDGE

SERVED: December 15, 1999
NTSB Order No. EA-4766

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of December, 1999

JANE F. GARVERY, Administrator, Federal Aviation Administration, Complainant, v. TRAVIS WERTH, Respondent.	)	Docket SE-15013

ORDER DENYING RECONSIDERATION

By Order EA-4766 (served May 13, 1999), the Board denied respondent's appeal from the law judge's decision that he had, as alleged by the Administrator, violated 14 C.F.R. § 135.73 by refusing to allow an FAA inspector to perform a ramp check. In a petition for reconsideration of our order, opposed by the Administrator, respondent argues, in effect, that our decision may have an unintended, adverse impact on air safety because it could be read as requiring pilots to permit an inspection even though they believe the individual claiming to be an inspector may pose a security threat. We fail to understand how our

decision could be so read. The only issue decided in this case was whether respondent's company manual justified his conduct. Our determination that it did not has no bearing on the propriety of a refusal to allow access for reasons that were not litigated. Respondent's petition, in other words, does not in this connection identify any error or matter in our original decision in need or correction, and, in our judgment, it does not otherwise establish that it should be altered in any way.

ACCORDINGLY, IT IS ORDERED THAT:

The petition for reconsideration is denied.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHIDT and BLACK, Members of the Board, concurred in the above order. GOGLIA, Member did not concur, and submitted the following dissenting statement:

I would grant the petition for reconsideration. The respondent's refusal to allow the inspector access to the aircraft was the result of his mistaken belief that under his company manual only the captain could grant such access. In fact, the manual provision he apparently had in mind did not limit is authority to allow an inspector to check out a company aircraft on a ramp. Rather, it simply contained a specific directive to the pilot in command of company aircraft to permit free and uninterrupted access to the pilot compartment to FAA inspectors who would be performing enroute inspections. I do not think the respondent, who otherwise was cooperative and polite in dealing with the inspector (and provided, save the logbooks, everything else requested), should be sanctioned for his misinformed effort to follow what he erroneously believed the manual required of him, especially since it would not have unduly burdened

the inspector to delay the inspection until the caption returned to the aircraft.

FINDINGS OF FACT AND CONCULSIONS OF LAW

(1) The Respondent, Travis Werth, admits and it is found of all times material herein, Respondent was and is the holder of Commercial Pilot's Certificate Number 376901243. Let me digress just a moment and say that here was the holder of commercial pilot's certificate at the time of this violation, July 18th, 1996. He is now ATP rated.

(2) The Respondent admits and it is found that on or about July 18th, 1996, Respondent operated civil aircraft N185BA, a Leer model 35, on a Part 135 flight departing V.C. Byrd International Airport Antigua.

(3) It is found that prior to said departure, a representative of the Federal Aviation Administration approached the Respondent and informed Respondent that he was conducting a ramp inspection of the aforesaid aircraft.

(4) It is found that the Respondent repeatedly refused the representative's request to enter the aforesaid aircraft.

(5) It is found that as a result, the Respondent, Travis Werth, violated Section 135.75 of Federal Aviation Regulations in that Respondent failed to allow a representative of the Administrator to make an inspection of the aircraft.

(6) It is found that pursuant to 49 U.S.C. Section 44709 Respondent's above-noted actions prohibiting, interfering with or otherwise failing to allow said inspection of the aforesaid aircraft is grounds for suspending Respondent's Airman Pilot Certificate.

(7) This Judge finds that safety in air commerce or air transportation find the public interest does apparently require the affirmation of the Administrator's Order of Suspension in view of the Respondent's violation of Section 135.75 of the Federal Aviation Regulation.

ORDER

It is ordered that the Administrator's Order of (Whereupon, an off-the-record discussion ensued.)

JUDGE FOWLER: Let the record indicate that counsel for the Respondent has indicated that he will be filing a Notice of Appeal and a brief perfecting that appeal within the parameters of the time that I've just set forth.

If there's nothing further at this time, I will declare this hearing closed. But before we go off the record, I would like once again to thank counsel for both sides for their very diligent, erudite and cogent efforts on behalf of their respective clients.

I would also like to express my thanks to all of the witnesses and parties in the courtroom for their help, assistance and cooperation during the course of this proceeding. Thank you all very much. We stand adjourned.

(Whereupon, the foregoing proceedings concluded at 1:25 p.m.)

Edited
4-9-98
s/Chief Judge William E. Fowler

14 C.F.R. § 135.73 (1996).

Inspections and tests.

Each certificate holder and each person employed by the certificate holder shall allow the Administrator, at any time or place, to make inspections or tests (including en route inspections) to determine the holder's compliance with the Federal Aviation Act of 1958, applicable regulations, and the certificate holders' operating certificate, and operations specifications.

14 C.F.R. § 135.75(a) (1996).

Inspectors credentials: Admission to pilot's compartment: Forward observer's seat.

(a) Whenever, in performing the duties of conducting an inspection, an FAA inspector presents an Aviation Safety Inspector credential, FAA Form 110A, to the pilot in command of an aircraft operated by the certificate holder, the inspector must be given free and uninterrupted access to the pilot compartment of the aircraft. However, this paragraph does not limit the emergency authority of the pilot in command to exclude any person from the pilot compartment in the interest of safety.